

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT 20 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

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| THE STATE OF ARIZONA, |) | 2 CA-CR 2011-0218-PR |
| |) | DEPARTMENT A |
| Respondent, |) | |
| |) | <u>MEMORANDUM DECISION</u> |
| v. |) | Not for Publication |
| |) | Rule 111, Rules of |
| JESSE FLORES MORENO, |) | the Supreme Court |
| |) | |
| Petitioner. |) | |
| _____ |) | |

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20070158

Honorable Richard S. Fields, Judge

REVIEW GRANTED; RELIEF DENIED

Isabel G. Garcia, Pima County Legal Defender
By Joy Athena

Tucson
Attorneys for Petitioner

E C K E R S T R O M, Presiding Judge.

¶1 Jesse Moreno petitions this court for review of the trial court's denial of his petition for post-conviction relief brought pursuant to Rule 32, Ariz. R. Crim. P. We will not disturb that ruling unless the court clearly has abused its discretion. See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007).

¶2 Moreno was convicted after a jury trial of four counts of burglary; two counts each of aggravated assault, sexual abuse, and sexual assault; and one count each of kidnapping and attempted armed robbery. The charges arose from Moreno’s attacks on the same victim on consecutive nights. He was sentenced to a combination of presumptive and aggravated, concurrent and consecutive prison terms totaling 30.5 years. We affirmed his convictions and sentences on appeal. *State v. Moreno*, No. 2 CA-CR 2008-0096 (memorandum decision filed Sept. 3, 2009).

¶3 Moreno then filed a notice and petition for post-conviction relief, arguing his trial counsel had been ineffective in failing to request sanctions pursuant to Rule 15.8, Ariz. R. Crim. P., when the state disclosed DNA¹ evidence linking him to several of the charges after it had withdrawn a plea agreement. Rule 15.8 provides that, if the state “has imposed a plea deadline” but “does not provide the defense with material disclosure listed in Rule 15.1(b)[, Ariz. R. Crim. P.,] at least 30 days prior to the plea deadline,” the court, upon motion, shall determine whether the state’s “failure to provide such disclosure materially impacted the defendant’s decision” to accept or reject the plea. If so, and the state “declines to reinstate the lapsed plea offer, the presumptive minimum sanction shall be preclusion from admission at trial of any evidence not disclosed at least 30 days prior to the deadline.” Ariz. R. Crim. P. 15.8. Division One of this court recently determined that Rule 15.8 applies when the state withdraws an open-ended plea offer, not only a plea offer with a predetermined expiration date. *Rivera-Longoria v. Slayton*, 225 Ariz. 572, ¶ 15, 242 P.3d 171, 174 (App. 2010), *review granted* (Ariz. May 24, 2011).

¹Deoxyribonucleic acid.

¶4 After an evidentiary hearing, the trial court denied relief and dismissed Moreno’s petition. It found that, although “trial counsel’s performance may have fallen below an objectively reasonable standard” when he failed to file a Rule 15.8 motion, Moreno had not demonstrated the required prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984) (defendant must establish both deficient performance and resulting prejudice to prevail on ineffective assistance claim). The court reasoned that, even had the state proceeded to trial without the DNA evidence, Moreno still would have been convicted. And it determined that, if the state had reinstated the plea offer, Moreno would not have accepted it.

¶5 On review, Moreno asserts the trial court applied the wrong standard in determining he had failed to demonstrate the required prejudice. He asserts that, even if the ultimate outcome—his conviction—would have been the same, he nonetheless was prejudiced because “the trial proceedings would have been different” and his counsel’s failure to file a Rule 15.8 motion deprived him of “several due process opportunities.” Moreno cites no authority supporting this view of prejudice under *Strickland*. Indeed, his position is directly contrary to the rule announced in that case; in order to show prejudice, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. That Moreno arguably would have been entitled to some procedural step that he acknowledges “ha[s] nothing to do” with the outcome of his trial simply is not the type of prejudice that could entitle him to post-conviction relief.

¶6 Moreno next asserts the trial court’s finding he would not have accepted a re-offered plea agreement “is contrary to the evidence.” He argues the court misinterpreted his testimony at the evidentiary hearing. We need not reach this question

because it was unnecessary for the court to have done so. As Moreno acknowledged in his motion for clarification filed after the court denied relief, there was no evidence presented as to whether the state would have reinstated the plea offer. *See* Ariz. R. Crim. P. 15.8 (authorizing sanctions only when state “declines to reinstate the lapsed plea offer”). It was Moreno’s burden to present such evidence. *See State v. McDaniel*, 136 Ariz. 188, 198, 665 P.2d 70, 80 (1983) (claimant bears burden of establishing ineffective assistance of counsel and “[p]roof of ineffectiveness must be a demonstrable reality rather than a matter of speculation”). In the absence of evidence the state would have re-offered the plea had his attorney made a Rule 15.8 motion, Moreno cannot demonstrate there was a reasonable possibility of a different result; his claim therefore fails because he cannot show prejudice. *See Strickland*, 466 U.S. at 694; *see also State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (appellate court will affirm trial court’s ruling if legally correct for any reason).

¶7 For the reasons stated, although we grant review, we deny relief.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge